STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDWARD STANLEY TWEED,

Defendant-Appellant.

UNPUBLISHED
February 26, 1999

No. 202403
Oakland Circuit Court
LC Nos. 96-146423 FC and
96-146424 FC

Before: Cavanagh, P.J., Murphy and White, JJ.

PER CURIAM.

A jury convicted defendant of two counts of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(a); MSA 28.788(1)(1)(a). The trial court sentenced defendant as an habitual offender, fourth offense, MCL 769.12; MSA 28.1084, to two concurrent terms of twenty to forty years' imprisonment and vacated the sentences of twenty to forty years' imprisonment on his CSC convictions. Defendant appeals of right from the convictions. We affirm.

I

Defendant's trial began on October 10, 1997. After a jury was impaneled, the prosecution stated in opening statement that defendant had sexual intercourse with the minor complainant "on a fairly regular basis for the next two years, i.e., the two years following the first of the two alleged incidents of CSC.[1] Defense counsel objected and requested a mistrial, which the trial court granted. See note 1, *infra*.

On the afternoon of the same day, a second jury was impaneled. Before the second trial began, the following colloquy occurred:

> [*Defendant's counsel*]: From defense, a few things, judge. I believe it's the Prosecution's intent to bring up prior bad acts or other incidents which have not been charged against Mr. Tweed.

THE COURT: Did he give you notice that he was going to do it?

[*Defendant's counsel*]: I have received no 404(b) notice. I would ask—

THE COURT: Then he won't do it.

[*Defendant's counsel*]: I would ask – all right.

THE COURT: What else is there?

[A*ssistant prosecuting attorney*]: Nothing from me, your Honor.

[*Defendant's counsel*]: There's a couple more things, Judge.

There is a statement in one of the reports that . . . the alleged complainant [] made a statement to a neighbor girl down the street or made a statement that a neighbor girl down the street filed an assault complaint against Mr. Tweed and that was one of [the complainant's] reasons for coming forward to the police.

She also indicated that she was afraid of Mr. Tweed because he beat up her aunt all the time and afraid [sic] of Mr. Tweed because he broke her mother's ribs.

Now, as to the physical assaults, we have no independent evidence of that, it would simply be [the complainant's] word. And as for the allegation that she – one of the reasons she came forward was because she heard Mr. Tweed had assaulted a girl down the street, I believe those are more prejudicial than probative to the defense in a case where he's facing two charges of criminal sexual conduct in the first degree.

[*Assistant Prosecuting Attorney*]: Judge, my response to that is, the pivotal point in the believability of a witness [sic complainant] of child sexual assault, in fact, any complainant, is why are they disclosing something at the time they're doing it.

In this particular case the People are claiming that due to the fear that [the complainant] had of the defendant, because she saw him assault other people in her life, she did not disclose until it was safe to do so. It became safe to do so when the defendant was arrested on the charge that related to the girl down the street from [the complainant].

For that reason, I believe it's extremely probative and no prejudicial value would outweigh the probative nature of this particular claim that the complainant is making. It is the pivotal point of believability for my complainant, and that is what the jury must do, believe her or not believe her.

THE COURT: Well, I can't decide it in a vacuum. I would have to hear what the youngster has to say. The argument that it's more prejudicial than probative, it would

have to be substantially more prejudicial than probative. It would be probative if the Prosecution's assertions are correct.

[*Defendant's counsel*]: If [the complainant's] allowed, though, to testify to a friend telling her she had been sexually assaulted, that goes right to another criminal act.

THE COURT: That may be true.

[*Defendant's counsel*]: If she brings that up, it opens the door to the prosecution bringing in a possible conviction.

THE COURT: I don't think that the prosecution can do it –

[*Assistant Prosecuting Attorney*]: No.

THE COURT: --as their evidence in chief.

[*Defendant's counsel*]: Okay. All right.

[*Assistant Prosecuting Attorney*]: I don't intend to bring into – any conviction other than the fact that [the complainant] heard that another girl down the street made a report.

THE COURT: Well, in any event, we're going to – these matters should have been taken care of before the trial date.

In his second opening statement, after describing the two alleged incidents of sexual misconduct, the last incident being in the summer of 1993, the prosecutor stated:

[The complainant] did not tell anybody in authority about this, or her mother, however, until January of 1996, some two and a half years later. The reason why she did not is because she was frightened and she will tell you why she was frightened.

She was frightened of the defendant. She was frightened because she saw him be abusive to other people in the past. And the person that she saw him be abusive to in a physical manner, and the reason why she feared telling anybody, was her Aunt Kim. The defendant, during the time that [the complainant] stayed at his home, hit Kim. [The complainant] saw this.

[The complainant], in her own mind, told herself that if she tells somebody about this, she would get hit. Something physically wrong would go on between her and the defendant, other than the sexual intercourse that occurred. So [the complainant] did not tell.

The thing that made her tell was a situation in which she finally felt that she had some measure of safety in telling. A young girl down the street from [the

complainant] made a police report in January of 1996 and that police report was an allegation that the defendant had done something of a sexual nature to her as well.

Because of that young girl coming forward, [the complainant] came forward as well and she made a police report. She told her mother and her mother took her into the Burton Police Department. And here we are today. [Emphasis added.]

Defendant's counsel did not make a contemporaneous objection, but stated after the prosecutor's opening statement that she wanted to make a motion. The trial court asked that she give her opening statement first, stating that it would reserve the motion. Defendant's counsel gave her opening statement and the complainant testified, after which the court excused the jury and the following colloquy ensued:

THE COURT:

. . . . During opening statement defense objected to a part of the prosecutor's statement. It came at the time when the prosecutor made the statement as to why the young lady spoke to another young lady about the incident; is that correct, counsel?

[*Defendant's counsel*]: Well, I believe he actually said – excuse me, your Honor, if I can find it. I believe [the prosecutor] said that that young lady filed a police report of a sexual nature against Mr. Tweed and that was my objection. I just think it's 404(b) again.

[*Assistant Prosecuting Attorney*]: Judge, this issue was specifically addressed in defendant's motions in limine. At that particular time, I explained the reason why I was going to be offering evidence of this particular nature and I stated to the Court that the only thing I was going to be doing is that I would have the complainant testify that she heard that another girl had made a police report for the same thing.

At that point in time we had a discussion about the defendant's resulting conviction that occurred as a result of that other girl and we discussed the fact that I would not be bringing out the fact that he was convicted or anything else happened, other than the fact that somebody made an allegation and that was the reason for coming forward. And that was what the Court allowed me to get into.

[*Defendant's counsel*]: If I may briefly, my interpretation of what the Court ruled was that you would see where the witnesses would go with it and we would deal with it then, which is exactly what we did. And it was taken care of in my mind's eye perfectly. My problem is that it came up in opening statement.

THE COURT: Well, it shouldn't have come up in the opening statement but inasmuch as there's no testimony as to what occurred, and the Court attempted to handle it as delicately as I could, I see that there's no reason for a mistrial.

[*Defendant's counsel*]: And not even –

THE COURT: I did it – I would tell counsel, you should not have mentioned it in opening statement. Although what the lawyer says in opening statement is not evidence and I intend to tell the jury that it's not evidence, and the case must be decided based on the evidence presented in open court.

If there's nothing further, we will adjourn court for the evening.

[*Defendant's counsel*]: Just briefly, Judge, I discussed this with Mr. Tweed. I don't even want a cautionary instruction on that, I don't want to remind the jury.

THE COURT: I'm going to give them one at the end of the trial.

[*Defendant's counsel*]: Okay.

At trial, the jury heard no evidence concerning the substance of the other girl's allegations. After the prosecution rested, the prosecutor requested clarification of the court's earlier ruling:

. . . I need a clarification of a ruling the Court made earlier. It's my understanding that when we were discussing at the bench, when [the complainant] was testifying, that you made a ruling that [the complainant] could not specifically state what a girl named [ ] had told her about making an arrest report or a police report concerning the defendant having some sexual contact with her and [the complainant] did not testify to the content of that discussion.

However, I believe that you did indicate that I could have that testimony brought out by somebody else. That somebody else would be Detective Illig and the reason why it was going to be brought out was just to clarify why [the complainant] came forward.

And as an offer of proof, it's the People's position that she came forward at a time when she knew that she would be safe from the defendant. It was at the time that [the neighbor] made the report that the defendant was arrested and taken into custody, and it was at that time that the victim in the present case at bar came forward.

So I would like to have Detective Illig testify to the fact that after [the neighbor] made a police report, and we don't have to get into what the report was made for, that the defendant was taken into custody.

[*Defendant's counsel*]: If the jury hears that a police report was filed for sexual assault by another girl, they're going to believe that Mr. Tweed did it in this case. That is so substantially prejudicial, he won't have a chance.

[*Assistant Prosecuting Attorney*]: I believe it's prejudicial like I believe all evidence against the defendant is prejudicial, your Honor. However, due to the nature of this

particular charge and the nature of the disclosure, I do not believe that it substantially outweighs the probative value of the evidence.

THE COURT: First, it's hearsay.

[*Assistant Prosecuting Attorney*]: Correct.

THE COURT: And there's no exception to the hearsay evidence rule that you have shown me.

[*Assistant Prosecuting Attorney*]: Judge, the – I guess it's not actually hearsay, then. I would state that Detective Illig is only going to testify to the fact that defendant was taken into custody. He's not going to testify as to any statements made by anyone. He's going to testify what happened to the defendant. It is as a result of what happened to the defendant that the victim came forward.

THE COURT: Let me understand. You're expecting the officer to testify that because the defendant was taken into custody [the complainant] told him?

[*Assistant Prosecuting Attorney*]: No. I am only going to have the officer testify that at some point in time [the neighbor] made a police report and defendant was taken into custody. And [the complainant] made her statement around that time period. And I'm not going to have him get into the statements that [the complainant] made to him, that would be hearsay.

THE COURT: So you're going to ask the detective if Ms. [] made a police report, he took the defendant into custody and then what?

[*Assistant Prosecuting Attorney*]: That [the complainant] a statement – well, I'm just asking him the timing of that because I have already established the timing of [the complainant's] coming forward.

[*Defendant's counsel*]: Judge, for the very reason this man sits here in civilian clothing, the jury can't know he's ever in custody.

THE COURT: Well, that's not relevant. That's not relevant. That argument is –

[*Defendant's counsel*]: Well, that's an aside from my initial argument.

THE COURT: What is your initial argument?

[*Defendant's counsel*]: It is hearsay. It bolsters the credibility of the complainant. If they hear a complaint regarding sexual misbehavior was filed against this man in another jurisdiction, they are going – and that he was taken into custody, they're going to believe he did it in this case. That is substantially prejudicial.

> [*Assistant Prosecuting Attorney*]: I agree with the fact that he would not testify to the nature of the report that was made, that being the sexual report.
>
> THE COURT: It would appear to the Court that if relevant, the probative value is substantially outweighed by the danger of unfair prejudice, confusing the issue in this, and therefore, it is not admissible.

The jury convicted defendant of two counts of first-degree CSC. Defendant made a motion for new trial, arguing the two points he raises on appeal. The trial court denied the motion.[2] This appeal ensued.

II

Defendant first argues that the prosecution's assertion in the second opening statement that defendant had previously been accused of criminal sexual conduct by a girl in the neighborhood was improper and deprived him of his constitutional right to a fair trial.

This Court reviews a denial of a motion for mistrial for abuse of discretion. *People v Lugo*, 214 Mich App 699, 704; 542 NW2d 921 (1995). A motion for a mistrial should be granted only for an irregularity that is prejudicial to the defendant's rights and impairs the defendant's ability to get a fair trial. *Id.* When a prosecutor states that evidence will be presented, which later is not presented, reversal is not warranted if the prosecutor acted in good faith, *People v Johnson*, 187 Mich App 621, 626; 468 NW2d 307 (1991), and the defendant was not prejudiced by the statement, *People v Wolverton*, 227 Mich App 72, 75-77; 574 NW2d 703 (1997).

Although the prosecutor did not present evidence that a neighbor girl had accused defendant of sexual misconduct, we agree with the trial court that defendant did not establish that the prosecutor acted in bad faith by referring to such evidence and then not presenting it under the circumstances presented here.[3] Further, the colloquy reveals that the prosecutor's understanding of the court's earlier rulings was not unreasonable or unsupported by the record, and the expected testimony was mentioned only in the context of explaining why the complainant spoke up when she did. See *People v Starr*, 457 Mich 490, 501-502; 577 NW2d 673 (1998). Additionally, as the trial court observed, defendant declined the trial court's offer to give a curative instruction, and the court later instructed the jury that the lawyers' statements were not evidence.[4]

III

Defendant also argues that the trial court erred in permitting a physician, Dr. Smyth, to testify as an expert witness when she did not examine the complainant until 1996 and the charged sexual misconduct occurred in 1991 and 1993.

We review a court's determination to admit expert testimony for abuse of discretion. *People v Christel*, 449 Mich 578, 587; 537 NW2d 194 (1995). In criminal sexual conduct cases, an examining physician's testimony is admissible for the narrow purpose of establishing penetration or penetration

against the victim's will. *People v Vasher*, 167 Mich App 452, 459; 423 NW2d 40 (1988); *People v Naugle*, 152 Mich App 227, 236; 393 NW2d 592 (1986).

Over defendant's objection, the prosecution offered Dr. Mary Smyth, an attending pediatrician and director of the Child Advocacy and Protection Team at Beaumont Hospital, as an expert in pediatrics who performs gynecological examinations of children. Dr. Smyth testified that she examined the complainant on September 13, 1996. She testified that when she examined the complainant she had a history from the complainant's mother. Dr. Smyth testified that when she examines the hymen she looks for evidence of trauma, interruptions in the hymenal membrane or scars which would indicate that there had been an interruption and then subsequent healing. When asked if she saw any of those things in the complainant, she responded "What I saw were areas which appeared to be attenuated," meaning "lessened or smaller than the surrounding area," and that "[t]hat is actually a nonspecific finding. Without having seen her acutely, I couldn't say that that was specific to any trauma." Dr. Smyth stated that her finding was consistent with the history the complainant's mother provided, that the attenuation could be attributed to a penis and it could be attributable to other things. Dr. Smyth testified that, in addition to finding the hymenal attenuation, she found a scar less than a half inch long in the "posterior fourchette," which is the area where the labia minora meet in the midline. Dr. Smyth testified that she documented that scar because "[t]he structures in the posterior region tend to be the areas that are traumatized when there's traumatic injury, that area tends to sustain the brunt of the forces." Dr. Smyth testified that it was possible that the scar was caused by a penis going into the complainant in 1991 and 1993.

Dr. Smyth's testimony was largely limited to the issue whether penetration had occurred. Where the testimony is so limited, the expert need not have knowledge relative to the condition of the complainant's pelvic area prior to the offenses. See *Naugle*, *supra* at 236-237. The only testimony regarding the timing of the source of Dr. Smyth's observation was the testimony that it was possible that the scar was caused by penetration in 1991 or 1993. This testimony is not tantamount to an opinion that complainant was, in fact, penetrated in 1991 or 1993, or that she was penetrated at all. We thus find no error requiring reversal.

Affirmed.

/s/ Mark J. Cavanagh
/s/ William B. Murphy
/s/ Helene N. White

[1] After describing to the jury the incidents leading to defendant being charged with first-degree CSC, the prosecutor stated:

> That is the first charge that you will be considering, a sexual relation, sexual intercourse between the defendant and [complainant] just around the time of her tenth birthday in January of 1991. And when [the complainant] talks to you about this, I do not believe

that you are going to hear definitive evidence about what time exactly it was, what day exactly it was, what month exactly it was. The thing that she remembers about the first incident of criminal sexual conduct in the first degree, as I will explain to you later, was that it happened around her tenth birthday while she was sleeping on the floor in the bedroom in the defendant's mobile home.

It did not stop there. It progressed for the next two and a half years. The defendant would have sexual intercourse with [the complainant] on a fairly regular basis for the next two years.

[*Defense counsel*]: Judge, I have to object at this point. May we approach or would have the jury removed?

THE COURT: Take the jury out.

THE CLERK: Yes, your Honor.

(At 11:31 a.m., jury left the courtroom.)

[*Defense counsel*]: Your Honor, the Court specifically ruled that the prosecution was precluded from bringing up any uncharged acts and that's exactly what the prosecution has done in his opening statement. He has brought up other incidents that have allegedly occurred between Mr. Tweed and [the complainant].

You forbade that. You said because the defense had received no notice under 404(b) that the prosecution could address January of 1991 and July of 1993. I believe this jury is now tainted and I am asking that they be struck and we pick a new jury.

[*Assistant Prosecuting Attorney*]: Judge, you specifically excluded evidence that would have been offered pursuant to rule 404(b), that is correct. That is not what this evidence is coming in under. 404(b) talks about similar acts to prove different things. It talks about similar acts to prove motive, common plan or scheme, or identity of the defendant. There is a whole other realm in which similar acts, if you want to call them that, come in with respect to child sexual conduct cases.

And the case specifically on point in this regard is a Michigan Supreme Court case called People versus DerMartzex. And what [that case] stands for is the proposition that a witness can testify about noncharged acts to show credibility of the witness and to explain to the jury why a person is only charged – or excuse me, strike that – to explain to the jury that when a person is charged with only one or two incidents, and it has happened many times in the past, the jury is entitled to hear that information to determine the credibility of the witness.

And it has nothing to do with Rule 404(b). And it has nothing to do with any of the reasons that Rule 404(b) stands for. Pursuant to that Supreme Court case, I would ask that you allow that testimony.

[*Defense counsel*]: Judge, I have to respectfully disagree with counsel. The Court made a specific ruling that only January of 1991 and July of 1993 could be addressed in this jury trial. What the prosecution is doing is bringing through the back door the very uncharged acts that you ruled couldn't come in.

This is, I believe, substantially prejudicial. These are normal people. They're just like me, just like the prosecution. I know that they're going to think that if he did this all these other times, that he certainly did it the two times that are charged. And that's why I moved the way I did in the beginning, that we only talk about the two incidents that have been charged.

THE COURT: I think you violated the Court's rule. As I recall DerMartzex, DerMartzex was one that went, if the defense challenged the credibility of the witness, say that the act did not occur, then the prosecution, as part of its case to sustain the credibility of the challenged individual, could bring out the acts. But there's been no challenge to the child's credibility as yet.

[*Assistant Prosecuting Attorney*]: I don't believe that that's –

THE COURT: Give me the case number, counsel.

[*Assistant Prosecuting Attorney*]: I don't have it off the top of my head, Judge.

THE COURT: You better go find it, counsel, and I'll give you a few minutes to go find it. Because I feel that you intentionally violated the Court's order. But if I'm incorrect, then we will correct it. If not, I'm going to declare a mistrial and I'll want to speak to you.

* * *

THE COURT: Couple of things come to mind. Number one, People versus DerMartzex is a case at 390 Mich 410, 1973 decision that predates VanderVliet at 444 Michigan, and also Golochowicz.

Exactly what did the prosecutor say, court reporter? Read it back.

[Court reporter read back pertinent statements.]

THE COURT: It's obvious that the Prosecution intends to offer a pattern of conduct which false [sic] under 404(b). . . .

It's obvious that [the prosecutor] intends to offer 404(b) evidence and it is not admissible. Objection sustained. Declare a mistrial. Bring in the jury. We will draw another jury this afternoon.

[2] The court noted:

> The defendant first contends that he is entitled to a new trial because during his opening statement the prosecutor mentioned that another girl had accused the defendant of sexually molesting her, despite the fact that the Court had precluded the prosecutor from introducing evidence under MRE 404(b). This was mentioned to show why [the complainant] came forward when she did. As it turned out, the prosecutor did not call a witness to testify on this point.
>
> The opening statement is the appropriate time to state the facts to be proven at trial. When the prosecutor states that evidence will be submitted to the jury, which subsequently is not presented, reversal is not warranted if the prosecutor acted in good faith. People versus Johnson, 187 Michigan Appeals 621, 626, 1991 decision; leave denied 439 Mich 978, 1992 decision.
>
> Defendant has not presented any facts to show that the prosecutor was acting—not acting in good faith. Given that, plus the fact that the defendant declined the Court's offer to give a curative instruction and the Court later instructed the jury that lawyers' statements were not evidence, the Court finds that a new trial is not warranted on this ground.
>
> Defendant next contends that he is entitled to a new trial because the Court erroneously permitted a doctor to testify as to the condition of the young girl's pelvic area following a physical examination in 1996, several years after the alleged incident took place. Defendant contends that such evidence should not have been admitted absent foundational evidence of the condition of the youngster's pelvic area prior to the alleged assaults.
>
> In a criminal sexual conduct case, an examining physician's testimony is admissible for the narrow purposes of establishing penetration or penetration against the will of the complainant. If a complainant has engaged in intercourse subsequent to the alleged assault but prior to the medical examination, the physician is not qualified to opine whether the complainant was assaulted on the alleged date unless a proper foundation is established.
>
> A proper foundation requires some evidence as to the condition of the victim's pelvic area prior to the date of the alleged assault. Without such a foundation, the physician's testimony must be limited to whether penetration has occurred. People versus Naugle, 152 Michigan Appeals 227, 236, 237, 1986 decision.

> Because Dr. Smith's [sic] testimony was limited to the issue of whether penetration had occurred as opposed to when the penetration had occurred, and that is my recollection from the testimony, her testimony was admissible despite a lack of foundation relative to the condition of the youngster's pelvic area prior to the offenses. Id.
>
> Wherefore, defendant's motion for a new trial is hereby respectfully denied.

[3] The trial court permitted the prosecutor to elicit testimony from the complainant, over defendant's objection, that she first reported the alleged incidents because she was told or heard something about "the girl down the street."

[4] We further conclude that in light of unobjected-to trial testimony, it is unlikely that defendant was prejudiced by the prosecutor's remark in opening statement. On cross-examination of the complainant's mother [who was defendant's sister-in-law], the complainant's mother testified that she had custody of defendant's children. Defendant's wife also testified that she had given her sister, the complainant's mother, custody of the children she had by defendant. On redirect, the prosecution asked the complainant's mother why she told defendant that he would not see his kids again. The complainant's mother responded "Because he just stopped in and stopped out and it was confusing both of the children, and both of the children have been molested." Defense counsel did not object. The prosecutor then asked her when she said that to defendant, and she responded:

> When I first got them. He did come and stay a night and when I found out about my daughter, and I already knew about the children, I didn't want to believe it was him. But then when my daughter come out and said that he had raped her, then I didn't think it would be a good idea for him to be around any of the children.